In that case he received five years.

And back in 1982, the violent B felony of attempted kidnapping in the first degree, where the defendant abducted a kid by the name of Woodrow Sultan with intent to compel that individual's mother's sister or whichever, it's not clear, to pay a sum of money for the victim's release.

Your Honor, it appears that the only times that the defendant isn't committing crimes are when he is incarcerated.

His record is extremely lengthy.

In this case he was convicted by a jury after trial. It took them a few hours to reach a verdict.

Based on the nature of this case, based on his lengthy criminal history, I think that a significant jail sentence is appropriate, and the People are recommending eighteen years.

THE COURT: Mr. Green, Mr. Keith.

MR. KEITH: Your Honor, first of all, with regard to the probation report, there are a couple of items that I would like to correct.

In the description of the offense, it indicates that on Mr. Green's person there was a set of keys that could access both of the rooms in question, and I think the evidence made it unequivocally clear that he only had a key for the fourth floor apartment and not for the second floor apartment and I would just like that portion of the probation report to reflect that.

Additionally, the probation report indicates that he is a multi-state offender, and that is incorrect. He has one out of state conviction and that was for a weapons charge and that was a federal conviction.

In that case he was sentenced to sixty months and that time period ran concurrent with the New York State conviction for the drug sale.

The assistant characterizes Mr. Green as having a lengthy record. His record covers a long period of time. The fact of the matter remains there are only three felony convictions.

The kidnapping, what it was was a personal matter and that is from over thirty

years ago, and then the drug sale and the federal gun charge, and the rest of his record is relatively minor. It's not an extensive criminal history, but it does cover a long period of time.

Having said that, your Honor, Mr. Green is 58 years old and the trial that we experienced was a challenging endeavor, to say the least. I had to, as they say, fall on the sword. I made some statements and made some decisions that led to some adverse rulings by your Honor that substantially hurt Mr. Green during the trial.

As I have said before, this trial was based on the testimony of police officers that your Honor correctly concluded acted illegally on the day in question.

And the statements, sworn statements that were made at the time of the issuance of the first search warrant affidavit, at the time of the Grand Jury presentation, at the time of the hearing that your Honor conducted and at the time of the second search warrant affidavit and at trial, were inconsistent.

And it's clear beyond dispute that

Officer Romero, in particular, gave perjurious testimony and inconsistent statements directly to your Honor and to the jury in this case.

Mr. Green certainly was denied a fair trial and I pray that he will have success on his appeal.

But having said that, your Honor, with regard to sentencing and the punishment that you must give Mr. Green, the minimum sentence available to Mr. Green convicted of the A-1 felony is twelve years.

Your Honor, he is 58 years old and even if we assume the worse, that he was either holding drugs for someone or involved in the drug trade in some way, a twelve year sentence for a 58 year old man I would think is more than appropriate under the circumstances of this case and with the legal issues that have been raised by what has happened from the beginning of this case to the time of his conviction.

Your Honor has not had the opportunity to learn much about Mr. Green other than what's been alleged and the

information I contained in my moving papers and the information that is in the probation report. I have talked to this man on numerous occasions and, your Honor, for what it's worth, he impresses me as a man with above average intelligence.

I have learned about his family. He is married to a devoted wife. He has children and grandchildren. He is a father and grandfather. All indications are that at the time of this incident he was, in fact, working at that building. The keys certainly suggest that he had access to just about every apartment and the laundromat at that location.

Your Honor, I'm asking you to be merciful. I am concerned about the appellate process and what will happen here. I am hopeful that there will be success. But in terms of punishment that your Honor is about to impose, it seems to me that the minimum sentence of the twelve year sentence is more than appropriate under all of the facts and circumstances of this case.

THE COURT: Anything Mr. Green wants

to say?

MR. KEITH: Mr. Green does not wish to speak.

One moment.

(Brief pause.)

MR. KEITH: Your Honor, Mr. Green asked me to ask your Honor if you would consider setting a bail pending appeal.

THE COURT: No.

You wanted to say something?

MR. BERLAND: Briefly, something that Mr. Keith mentioned that I take issue with.

He stated that it is clear beyond dispute that Detective Romero perjured himself during this trial, and the People want to place on the record that we wholeheartedly dispute this baseless allegation.

THE COURT: Okay.

All right.

I made certain findings during the course of what is known as the Darden Hearing. They stand.

Now we have to impose the sentence, and these are the reasons why the sentence is

going to be imposed:

The legal issues that have been referred to did not exist on the date that the crime was committed.

I don't have any doubt whatsoever that you had possession of the drugs, as New York defines possession, given your access to them, given the amount of money that those drugs were worth and the location and the circumstances under which you were found.

Certainly, you do get some benefit for having survived to be 58 years old. I am not much past that and that's a life work in itself, but what you have done with your life is distressing.

As far back as when you were 18 years of age, apparently you comitted some kind of a robbery. You were given what is known as youthful offender treatment, which means non-jail, and then for some reason you fouled up and got four years. Then you did the kidnapping for "personal reasons," whatever that is. Then you had one or two drug felony convictions.

So it is with a significant amount of salt that we take your denial that you were not involved or had any involvement in this situation.

With respect to the A-1 felony, which only a few years ago would have gotten you a life sentence, the sentence is that you should serve fifteen years determinate.

With respect to the B felony conviction, twelve years determinate concurrent with the fifteen that I imposed on the A-1 felony.

With regard to the A-1 felony, there is a mandated five year post release supervision which I am imposing.

With respect to the B felony, a concurrent three year post release supervision.

On each of the two misdemeanor charges, you are sentenced to one year each.

Those by law merge with the determinate sentences that have been imposed.

You're mandated to receive a total of $320 in crime victim, DNA and mandated surcharges.

I am sure there is an appeal.

We'll all wait to read about it together.

Advise him of his right to appeal.

MR. KEITH: I certainly will, your Honor, and I will file the notice of appeal.

Thank you.

MR. BERLAND: Thank you, your Honor.

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Certified to be a true and accurate transcription of the minutes taken in the above-captioned matter.

THERESA MAGNICCARI
Senior Court Reporter

To be argued by
EDWARD GREEN

NEW YORK SUPREME COURT

APPELLATE DIVISION – FIRST DEPARTMENT

The People of the State of New York,
Respondent

- Against –

EDWARD GREEN,
Defendant – Appellant.

PRO SE BRIEF FOR DEFENDANT-APPELLANT
INDICTMENT NO. 5643/07

EDWARD GREEN 08A5510
Clinton Correctional Facility, Annex
P. O. Box 2002
Dannemora, N.Y. 12929

March 2010

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Respondent

- Against -

EDWARD MR. GREEN
Defendant

AFFIDAVIT IN SUPPORT OF PRO SE MOTION FOR EDWARD GREEN

Indictment No. 5643/07

TO THE SUPREME COURT)
ss:
COUNTY OF NEW YORK)

PLEASE TAKE NOTICE that upon the annexed affidavit of Edward Green, being duly sworn, deposes and says:

I am the defendant in the above-entitled proceeding. I make this affidavit in letter-brief form in support of an application, pursuant to section(s) 450.15 and 460.15 of the Criminal Procedure Law ("CPL") and section 670.12 (b) of the Rules of the Court, for a certificate granting permission to appeal to this Court from an Order of the Supreme Court of the State of New York, County of New York, by the Honorable Edward J. McLaughlin, J,P., upon a jury verdict, convicting Mr. Edward Green ("Green") of the crimes of Criminal Possession of a Controlled Substance, a class A felony in the First and a class B felony in the Third Degree, in violation of Penal Law, §§220.21(1), 220.16(1), on the 15 day of September 2008 and sentencing him to a term of 15 years.

Under the provisions of CPL §460.50 (1), bail pending appeal is not statutory authorized. since the defendant is presently incarcerated and serving his prison sentence, any delay occasioned by ordinary motion practice would be extremely prejudicial. In the event that a certificate were to be ordered granting permission to allow this petitioner, pursuant to CPL §460.15, to file a pro-se supplemental brief. This petitioner will move this Court for an order

allowing for an expedited appeal.

In accordance with the requirements of Section 670.10.3(g) of the Rules of the Court, the following information is supplied:

(a) The applicant is Edward Green, Pro-se, Din: 08A5510, facility address is: Clinton Correctional Facility Annex, P.O. Box 2002, Dannemora, N.Y. 12929.

(b) The People are represented by the District Attorney of the County of New York, 1 Hogan Place, New York 10013

(c) The New York County Indictment Number is 5643/07

(d) The question of Law or Fact which ought to be viewed by this Court is whether at trial, did Mr. Edward Green received Ineffective Assistance of Counsel where trial Counsel "Mr. Arnold Keith" admitted ignorant of the applicable Criminal Procedure Law, as well as admitted to providing Mr. Green with Ineffective Assistance of Counsel at sentencing and thus could not have given Mr. Green effective advice or where counsel was not prepared for trial and was generally unfamiliar with procedures in a Criminal trial, in clear violation of Mr. Green's Constitutional Rights to the Right to Effective representation which includes the right to assistance by an attorney who is familiar with, and able to employ at trial the basic principles of Criminal Law and Procedures.

QUESTION PRESENTED

The Evidence Adducted at Trial was Legally Insufficient to Support Petitioner's Conviction under Penal Law §§220.41 (1) and 220.16 (1), for Criminal Possession of a Controlled Substance in the First and Third Degree

ANSWER: YES

The indictment was invalid as a matter of law, in that the police laboratory controlled substance analysis report upon which the indictment is based did not charge and the trial Court did not find specified amounts of drugs...a fact that runs afoul of the U.S. Supreme Courts decision in Apprendi v. New Jersey, 530 U.S. 466 (2000). In Apprendi, the Court ruled that any fact that increases the penalty for a crime beyond the statutory maximum, it must be submitted to a jury and proved beyond a reasonable doubt. In light of the fact that the evidence was not only

material to the charges against the defendant, it was the only evidence linking him to the unlawful possession of drugs. The defendant's presence at the scene of the arrest, standing alone would not support the indictment. People v. Martin, 32 N.Y. 123, 343 N.S.Y.2d 343. The indictment was fatally defective because the grand jury had no evidence before it worthy of belief that the defendant had committed the crime charged by possessing a controlled substance

The validity of an arrest depends upon existence of probable cause at the time of the arrest and cannot be based upon evidence obtained as the result of an ensuring search (People v. McCarthy, 14 N.Y.2d 206; People v. Loria, 10 N.Y.2d 368, as was done here.

The police laboratory controlled substance analysis reports pursuant to CPL section(s) 100.15(1), subd. 4(A), and 100.20 was neither verified nor conforms to the requirements of CPLR section(s) 4540 (a), 4543 could not have commenced an action or provided a basis for a criminal prosecution.

Therefore, it became an error of such a degree that the integrity of the Grand Jury was Impaired and Prejudice to the defendant thus resulted. (People v. Williams, 73 N.Y.2d 84.

As a condition precedent to admissibility, a showing by a preponderance of the evidence, that the evidence offered is what its proponent claims it to be. In other words, if the person seeks to introduce a bag of drugs into evidence, it must first establish that the bag is what the people assert it to be. The bag found at the scene of the crime. One way to establish that fact is to show the chain of custody of the bag that is where the evidence has been from the moment it was seized until the moment it is offered into evidence.

The requirements of authentication or identification as a condition precedent to admissibility is satisfied by the evidence sufficient to support a findings that the matter in question is what it proponent claims

The people's failure to establish a chain of custody is important. In order to be admissible, the testimony of a live witness must be relevant, that is it must have a "tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

It should be noted that in order for Detective Alfred Hernandez ("Hernandez") or Detective Anthony Romero ("Romero") testimony to be relevant, there must be some likelihood that the substance tested by them was the substance seized from the safe on the Fourth Floor that was in a locked closet. The authentication testimony of a witness must be that person with knowledge who tested the substance and there must be testimony that a matter is what it claims to be. The People's failure to establish a chain of custody of authentication, from the time the substance was allegedly possessed to the time it was subjected to laboratory analysis makes this less likely, and thus casts doubt on the admissibility of a Hernandez or Romero's testimony.

The ultimate question is whether the authentication testimony is sufficiently complete so as to convince the Court of the improbability that the original item had not been exchanged with another or otherwise tampered with (see, United States v. Howard-Arias, supra, 697 F.2d @366.

Accordingly, establishing a chain of custody is one form of proof sufficient to support a finding that the matter in question is what its proponent claims to be.

An expert's opinion must be based upon his comparison of the results of various test made on the substances possessed by Mr. Green with the results of the same tests performed on a standard sample known to be his comparison of the results of the mass spectrometer test conducted on the standard sample with data contained by three recognized authorities in the field of chemistry. The chemist's notes and records pertaining to the test were never made available to Mr. Green or his Attorney for use at trial, which in fact became a "Brady" violation. The three

sources of the data the expert used for comparison with the results of the test on the sample were never identified by anyone or by name, and it is not contended that these were recognized authorities of the sort that ordinarily were accepted by experts in the field and its dossiers, the sources of which have not been independently established, scrutinized nor authenticated.

Contrary to any arguments that might be made, the trial record demonstrates that the people never satisfactorily authenticated the evidence that was sent to the police lab for analysis by conclusively establishing a chain of custody that began with the seizure and ended with the police laboratory.

There is no place found in the record where the testimony of forensic chemist's J. Bishara or Aviva Lieberman had demonstrated that the substance allegedly found in the safe was cocaine or the tests in which the substance allegedly possessed by Mr. Green was compared to substances known to be cocaine, but because the expert failed to testify, there was no proof that the substance that the chemist relied upon for comparative test was in fact tested by him and there was no proof in the record of any nature that established the accuracy of the standard as reliable norm, because of the failure of the chemist to testify, the Court must assume that the proffered expert testimony would have been incompetent to support the fact that the alleged substances was in fact cocaine. (People v. Rodriguez, 94 AD.2d 805, [462 N.Y.S.2d 914]).

Perhaps, most puzzling, is that the prosecution made no effort to clear up this discrepancy. They chose not to present the testimony of the chemist that analyzed the evidence or the lab staffer who logged it in, or the police officer who released the evidence to the lab.

In short, there was no competent proof to indicate that the evidence taken from the scene of the crime was the same one the police chemist tested. This important step in custodial pavane was omitted. As to the police chemist findings, the link was not merely rusty – it had been

parted. U.S. v. Ladd, 885 F.2d 954.

It should be noted, that drug field test, is a preliminary screening test, is insufficient to form a basis for prosecution on drug possession charges. The Court in Fasanaro, held that, regarding field test, where a police officer is testifying concerning the results of the field test in place of a chemist, and where he testified that the substance is in fact cocaine, the Court stated that generalized, unquantified and unspecified allegations of training and experience regarding narcotics were insufficient allegations of expertise to allege facts of an evidentiary nature showing a basis for the conclusion as to the identification of the alleged substance, and, without more, must result in a drug possession charge that is facially deficient[1], 134 Misc.2d 141; 502 N.Y.S.2d 713; CPL §§ 100.15 (B), 100.40 (4)(B).

The petitioner contends that the evidence should have been kept from the jury based upon (1) slipshod storage and handling of the evidence at the State laboratory and (2) a discrepancy in the evidence in identifying the chain of custody that binds the evidence, was so seriously flawed as to leave no reliable foundation for admission of the evidence.

The tests conducted by the police laboratory was flawed because (1) the police chemist did not testify and his failure to testify or to provide evidence that would have demonstrated that the laboratory's usual custom and praxis were followed and (2) there was no testimony by the laboratory chemist to support a findings that the evidence, once delivered, were stored in a locked evidence-locker and (3) nor was there testimony relating to whether the evidence was numbered and or labeled properly, (4) when or where the evidence were removed for internal testing and eventually replaced and (5) whether or not the laboratory procedures were followed

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[1] **It should be noted that there was no testimony before the Grand Jury or at Trial that either Detective Alfred Hernandez or Detective Anthony Romero had field tested the contents that came from the safe on the Fourth Floor.**